SANDRA L. LOUGH
DAMON M. BLACKBURN

IBLA 75-614, 76-93 Decided June 3, 1976

Separate appeals from decisions of the Alaska State Office, Bureau of Land Management, declaring trade and manufacturing site notice of location, AA-8493, unacceptable for recordation and declaring homesite notice of location, AA-8403, unacceptable for recordation.

Reversed and remanded.

1. Alaska: Trade and Manufacturing Sites--Tidelands

   Where a notice of location is filed for a trade and manufacturing site and such notice is declared unacceptable for recordation because the lands containing the business improvements are tidelands owned by the State of Alaska, the decision must be set aside and the case remanded when the record does not show that there ever was a survey conducted of such lands to determine whether they are, in fact, tidelands owned by the State.

2. Accretion--Avulsion--Submerged Lands Act: Generally-- Submerged Lands Act: Accretions--Tidelands

   Submerged and filled tidelands passed to the State of Alaska on the date of its admission to the Union, January 3, 1959. Ownership of tidelands subsequently created by avulsive action remains in those persons or entities, including the Federal Government, who held title to the land prior to the avulsive action.

3. Alaska: Homesites--Applications and Entries: Amendments

   The amendment of a notice of location of a homesite in Alaska may be allowed where the application is filed within the life of the 5-year period granted, and where the amendment embraces lands which the applicant has actually occupied and possessed.

4. Alaska: Homesites--Alaska: Possessory Rights-- Withdrawals and Reservations: Generally

   Where the claimant of a homesite filed his notice of location prior to the segregation of the land by a withdrawal made subject to valid existing rights, and he alleges, and the field reports so indicate, that he initiated the development of improvements sufficient to establish a valid existing right prior to the withdrawal, it is error for the State Office to hold that the withdrawal terminated the claimant's rights.

APPEARANCES: Sandra L. Lough, pro se; Damon M. Blackburn, pro se.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Appellant Sandra L. Lough has appealed from a decision of the Alaska State Office, Bureau of Land Management, dated May 12, 1975, declaring her trade and manufacturing site notice of location, AA-8493, unacceptable for recordation.

Appellant Damon M. Blackburn has appealed from a decision of the Alaska State Office, BLM, dated May 13, 1975, declaring his homesite notice of location, AA-8403, unacceptable for recordation. We have consolidated these two appeals since there is a conflict between them. Inasmuch as the factual basis for rejection in each case was different, however, we will treat the two appeals seriatim.

On September 10, 1973, Sandra L. Lough filed a notice of location for an 80-acre trade and manufacturing site. The site is located in section 24, T. 9 N., R. 2 E., Seward Meridian, along the Anchorage-Seward Highway near Portage, Alaska. Appellant stated on her notice that the site was desired for a "sawmill and lumbering."

On March 11, 1975, a land report was completed which had been compiled to determine appellant's compliance with the trade and manufacturing law, 43 U.S.C. §§ 687a, 687a-1 (1970). A field investigation on May 23, 1974, revealed improvements on the claim consisting of a 16' x 40' wooden frame building used as a residence, a 8' x 40' trailer, and a sawmill. Logs had been stockpiled and the mill was operating. Appellant's husband was interviewed at the site. He indicated the trailer was to be moved to his adjacent homestead, AA-8494.

The land report made the following finding, inter alia:

> After the 1964 earthquake, this area subsided approximately four to six feet. I called Tom Sexton of the Alaska State Division of Lands. He said that the State has identified this area as being tidelands. A surveyor should meander the mean high-water mark before we issue any patents. The State owns all lands up to the mean high-water mark in tidal areas. He suggested that I send a map showing the entries in the Portage area that may be affected to the director, Division of Lands, so that the State can start action to solve this land ownership question.

The report stated that although the mean high-tide mark had not been surveyed, it appeared that the sawmill site was located on filled tidelands which would not be public domain. It concluded that for that reason BLM would have no jurisdiction over the entry, the residence being the only improvement on public domain and a residence alone not being an authorized use for a trade and manufacturing site.

The report recommended that the notice of location be declared unacceptable for recordation and that the case file be closed "if the mill site is located on tideland."

Because the subject lands were part of the lands withdrawn by PLO 5418, 39 F.R. 11547 (1974), actual use and occupancy of the land for trade and manufacturing purposes must have taken place prior to the effective date, March 28, 1974.

The State Office found appellant's notice of location unacceptable for recordation by decision dated May 12, 1975. Therein, it was stated:

> * * * Mrs. Lough acquired no rights to the land by the mere filing of a notice of location, and * * * Mrs. Lough has established a sawmill and a lumber business on tidelands administered by the State of Alaska but did not establish a valid existing right on public lands for a trade and manufacturing site prior to PLO 5418 withdrawal * * *.

Appellant has filed a statement of reasons disputing the State Office's designation of the lands as tidelands and asserting that she established her business operations on the site prior to the 1974 withdrawal.

If the location notice was regular on its face and the land was open to location at the time of its filing, it would be incumbent upon the State Office to accept the notice when offered and to record it as provided by 43 U.S.C. § 687a-1 (1970) and 43 CFR 2562.1. Elden L. Reese, 21 IBLA 251 (1975). Herein, the State Office waited until May 1975 to determine that appellant's notice was unacceptable for recordation.

[1] It is clear from the State Office decision that BLM considered appellant's sawmill to be located on tidelands. According to the Submerged Lands Act of May 22, 1953, 43 U.S.C. § 1301 et seq. (1970), title to Alaska tidelands, including artificially filled tidelands, and other submerged lands, passed to the State of Alaska upon its admission to the Union.

If the sawmill was, in fact, located on tidelands owned by the State, the land was not open to location at the time of filing and appellant should have been so informed by the State Office. If the State Office had no reason to question the status of the land as not being tideland at the time of filing, the notice should have been accepted for recordation. It was error for the State Office to proceed with a field examination to inquire into the legality of the location prior to recordation of the location notice. Elden L. Reese, supra.

Also the land report recommended that the location notice be declared unacceptable for recordation only "if the mill site is located on tidelands." The report did not conclude that the land was, in fact, tidelands owned by the State, yet the State

Office decision 2 months later declared appellant's notice unacceptable because she established a business on tidelands administered by the State of Alaska.

There is no evidence in the record of any survey being made to determine whether any or all of appellant's trade and manufacturing site is located on tidelands under the jurisdiction of the State of Alaska. It is improper to declare appellant's notice of location unacceptable for recordation on the basis that the site is at least partially located on tidelands when there has apparently been no survey conducted on which to base such a determination.

Therefore, the State Office decision rejecting the notice of location of appellant Lough must be set aside and the case remanded in order that a survey be conducted to determine whether the State of Alaska or the Federal Government has jurisdiction over the lands encompassed by appellant's trade and manufacturing site notice of location.

[2] Additionally, we note that the land report stated that "[a]fter the 1964 earthquake, this area subsided approximately four to six feet. I called Tom Sexton of the Alaska State Division of Lands. He said that the State has identified this area as being tidelands." It is unclear whether the State of Alaska is now claiming that the subject lands are tidelands because of the Alaska earthquake in 1964. Title to all the lands periodically or permanently covered by tidal waters passed to the State of Alaska upon its admission to the Union in 1959. Pexco, Inc., 66 I.D. 152 (1959). Included in this category were lands which in 1959 were artificially filled tidelands. See Effect of Artificial Fill on the Title to Alaska Tidelands, M-36600 (January 19, 1961). But the operative date of the grant is January 3, 1959. Thus, if the land in 1959 was filled tideland, title thereto passed to the State of Alaska.

We can find no authority, however, for the proposition that tidelands formed subsequently through avulsive change, pass, eo instante, to the State of Alaska upon their formation. In Harvey Redmond, A-31043 (November 4, 1969), the Department expressly declined to rule on this contention. The opinion did note, in footnote 5, that "[i]n addition to the question whether title to the land passed to the State as tideland, there is also the question whether, assuming title did not pass, the land is any longer 'public land'," citing Solicitor's Opinion, 60 I.D. 491 (1951).

That Opinion, however, dealt with the attempted assertion of scrip rights on lands presently covered by tidal waters, and ruled that such lands were not "public lands" available for the satisfaction of scrip claims. There is no contention herein that the lands sought by appellant Lough are either permanently or periodically covered by tidal waters.

While the Redmond case did not specifically reject the argument that tidelands formed by avulsive action after the admission of Alaska into the Union vest in the State upon formation, we think that various administrative and judicial pronouncements in matters closely parallel to this question show that the grant is effective only as it relates to lands which were either tidelands or filled tidelands as of the date of admission of the State of Alaska, i.e., January 3, 1959, as well as such lands which have become tidelands through the gradual process of accretion, reliction or erosion.

The separate States were, upon their admission to the Union, vested with sovereignty over the beds of navigable rivers. The grant, however, was only to the beds of those rivers and bodies of water which were navigable as of the date of the State's admission to the Union. See State of Utah v. United States, 403 U.S. 9, 11 (1971); Pollard's Lessee v. Hagan, 15 U.S. (3 How.) 391, 392, 406-07 (1845). While State ownership follows subsequent changes in the situs of the riverbed due to erosion, reliction or accretion, avulsive change works no alteration in a State's ownership. See Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 327 (1973).

We think it clear that if the lands involved herein are now considered filled tidelands as a result of the 1964 earthquake, such a change is clearly avulsive, and the State's ownership would not extend to such lands. The survey should be conducted with this principle in mind.

[3] On May 18, 1973, appellant Damon M. Blackburn filed a notice of location for a homesite described by metes and bounds. This site was also located in sec. 24, T. 9 N., R. 2 E., S.M. He alleged occupancy as of March 25, 1973, but stated that there were no improvements on the ground. A field examination was made on May 24, 1974. At that time the field examiner noted that the entryman had cleared part of the land, and established a camp consisting of a tent, bedding and cooking utensils.

On September 25, 1974, appellant sought to amend his original description to delete some lands and add others. On February 24, 1975, a second land report was prepared. That report made the following findings, based upon the original field report and a second examination of the land conducted on February 11, 1975:

> The examiners [in the second examination] found a partially completed A-frame cabin on the new site. The cabin was sitting on a foundation of pilings. We did find some plywood part way down the hill from the cabin site. * * *
>
> The examiners also found the location which [the original field examiner] had looked at on May 24, 1974. We plotted this location using aerial photograph P1 006, while on the subject site. We found that this site did not fall on Mr. Blackburn's claim as it was originally described.

The field report therefore concluded:

> Mr. Blackburn appears to have appropriated the land by his actions to date. However, the amended description includes lands reserved by PLO 5418; therefore, his amended application is only valid for that area which was part of the original description, 2.5 acres.

The Alaska State Office, however, by decision of May 13, 1975, held appellant's notice of location unacceptable for recordation in its entirety. The decision of the State Office recited that:

> Field examinations of Mr. Blackburn's claim, conducted on May 24, 1974 and February 11, 1975, revealed that there were no improvements nor any signs of use of the original homesite location to show that he had appropriated the land. The only improvement found by the field examiner was a partially completed A-frame type cabin which has been built on lands withdrawn from location by settlement and occupancy under PLO 5418 effective March 28, 1974. Therefore, Mr. Blackburn did not establish a valid existing right prior to PLO 5418 withdrawal.

We note, as an initial matter, that it was improper for the State Office to reject the original notice of location, since at the time that it was filed the land was open to location and the notice was regular on its face. Elden L. Reese, supra. Furthermore, it seems clear that the State Office incorrectly interpreted the field report as finding the A-frame building only on the land described in the amended notice of location, when, in fact, the A-frame is located on land which was part of the original, as well as the amended, location.

Two separate but interrelated questions must be examined. First, is the amended location allowable; and second, had appellant, through his actions, sufficiently appropriated the land so as to avoid the withdrawal effected by PLO 5418 on March 28, 1974.

Turning to the first question, the State Office rejected appellant's amendment of his original location, noting that the land had been withdrawn by PLO 5418 and was not available for subsequent entry. Considering all of the factors which we set forth below, we believe the State Office's decision was in error, and that the amendment sought by the appellant was allowable.

The regulation dealing with the description of unsurveyed land sought for a homesite provides:

> If the land is unsurveyed the application must be accompanied by a petition for survey, describing the tract applied for with as much certainty as possible, without actual survey, not exceeding 5 acres, and giving the approximate latitude and longitude of one corner of the claim. [Emphasis supplied.]

43 CFR 2563.1-1(a)(10).

The regulation is an administrative recognition of the difficulties attendant in describing the land without the benefit of an actual survey. It certainly implies that slight errors in description will not work to defeat the entry.

In this case appellant's claim is located on very rough and steep topography. It is noted that the first examiner did not ascertain that the original improvements were outside the described limits of the claim, and thus it is scarcely surprising that the appellant experienced similar difficulties.

In the absence of a withdrawal of the land, appellant's attempted amendment would clearly have been allowable. The issue, then, is whether the withdrawal effected by PLO 5418 prevents the acceptance of the amendment.

In Donald Richard Glittenberg, 15 IBLA 165 (1974), this Board rejected an amendment of notice of location of a headquarters site. In that case, however, the purported amendment was submitted on appeal, and the Board held that "it cannot be regarded as an amendment of the original notice, no application for purchase having been filed within the five-year term prescribed by statute. We must, therefore treat the purported amendment as a new notice of location which must be rejected because the tract actually claimed is no longer subject to entry." Id. at 168.

The instant case stands in stark contrast to the factual situation in Glittenberg. Appellant, herein, applied for the amendment within the time provided by statute in which to perfect his rights, 43 CFR 2563.1-1(c), rather than as an afterthought on appeal. The Glittenberg case clearly indicates that such an amendment may be permitted, with the amendment effective as of the date of the original notice of location.

This procedure has been followed in the past. In James A. Shipler, A-25197 (November 23, 1948), the Department permitted a desert-land applicant to amend his land description and relate the amendment back to the date of his original application and retain his priority over another applicant who had filed subsequent to the original application but prior to the filing of the amendment. Cf. Raymond Paneak, 19 IBLA 68 (1975); Flonie Thomas, 18 IBLA 7, 11 (1974).

We hold, therefore, that appellant's amendment, given the facts set forth supra, is allowable. This does not end the analysis, however, since it must still be shown that appellant performed sufficient acts of appropriation on the ground, within the limits of the amended location, to prevent the withdrawal of PLO 5418 from attaching.

[4] It is well-settled that the mere filing of a notice of location does not of itself create any rights in the land, and the filing of the notice "will not prevent a withdrawal from attaching to the land if, prior to the effective date of the withdrawal, the locator of the homesite fails to perform the requisite acts of use, occupancy and development necessary to establish a valid

existing right in the claim." Steven P. Remme, 24 IBLA 23, 27 (1976) and cases cited. The Board has held that the marking of the boundary lines and the posting of the corners of the tract does not constitute occupation or possession. Donald J. Thomas, 22 IBLA 210, 212 (1975); Donald Richard Glittenberg, supra at 168. The acts of appropriation envisaged by these decisions are those which would disclose to an observer on the ground that the land was under active development. Thus, in Donald J. Thomas, supra, the Board noted that the erection of a 10' x 12' tent, and the felling of trees preparatory to the construction of a cabin, occurring prior to PLO 5418, would be a sufficient appropriation, if proven, to remove the land from the effect of the March 28 withdrawal. See also Steven P. Remme, supra.

In the instant case appellant alleged, and the first field report indicated, that some of the land had been cleared, a number of logs had been felled, and that a camp, consisting of a tent, bedding and cooking utensils, had been established on the land. The second field report specifically found that "Mr. Blackburn appears to have appropriated the land by his actions to date." The State Office rejected this finding, apparently owing to a legal misconception concerning appellant's amendment of his original notice, as well as a factual misinterpretation of the findings made in the second field examination. Our review of the record shows that appellant sufficiently utilized the land to have appropriated it prior to March 28, 1974, and that PLO 5418 did not work a termination of his right.

We have noted, however, that appellant Blackburn's homesite location is in conflict with the trade and manufacturing location of appellant Lough. If there is a final determination that appellant Lough's sawmill is not located on filled tidelands it will be necessary for the State Office to resolve the conflict between the two entries.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are reversed, and the case files are remanded for further actions not inconsistent with this opinion.

Douglas E. Henriques
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Newton Frishberg
Chief Administrative Judge